

Refugee Protection and Burden-sharing in the European Union

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Abstract:

This article starts with discussing principles for a globally just system of refugee protection to which states contribute either by admitting refugees for resettlement or by supporting refugee integration in other states. Such a system requires relatively strong assurances of compliance by the states involved, which are absent in the international arena. In the European Union, however, the Member States form a predetermined set with prior commitments and supranational institutions that facilitate effective burden sharing. The article traces the failure of the EU's relocation scheme to meet this expectation to misconceptions how to determine fair shares, to incomplete prior harmonization of normative standards, and to contradictions between the Dublin Regulation's principle of assigning responsibility to first countries of entry, on the one hand, and the Schengen principle of open internal borders, on the other hand.

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1. Introduction

It has often been pointed out that the European refugee crisis is also a crisis of European integration. This paper tries to explain why and proposes a normative argument for a Europeanization of refugee protection. I argue that in addition to their general duties to admit refugees, EU member states have special duties towards each other that include sincere cooperation and a commitment to keep internal borders open. These three duties hang together in such a way that the failure of the member states to accept their general duties of refugee admission have triggered a severe crisis of European integration through the building of fences and sustained controls at internal borders as well as a more general decline of cooperation between member states.

The paper begins with a discussion of state duties to admit refugees based on recent political theory literature on the topic (section 2). I argue that a just refugee protection system must aim to maximize the number of refugees who will receive effective protection. This entails accepting other criteria for refugee distribution apart from wealth and size of states, including an option for states to choose between relocation of refugees to their territory and financial support for refugee integration in other states. A just system of refugee protection requires, however, relatively strong assurances of compliance by the states involved, which are absent in the international arena. Even if most states fail to comply, the remaining states nevertheless retain moral duties to cooperate in a burden-sharing scheme as long as none of them would face overwhelming burdens in such a cooperation.

In section 3 I argue that the European Union offers the best conditions that can be assumed under real world circumstances for an effective regional refugee protection regime. I locate the reason why this potential has not been realized in institutional failures to Europeanize refugee policies. This would have required abandoning the Dublin Regulation's assignment of full responsibility for asylum seekers to the first EU country of entry and replacing it with a European system of asylum registration, determination and relocation of asylum seekers. Given the failure of EU institutions and leaders to Europeanize asylum and refugee policies in time, they face now a populist backlash against refugee admission as well as European integration.

For the sake of brevity, I will not consider several characteristic features of the European refugee crisis (Triandafyllidou and Mantanika 2017): the sudden surge in numbers in 2015; the mixed composition of flows in terms of multiple origins and the mixed motives of asylum seekers to escape from violence but also to improve their economic opportunities; the involvement of people smugglers and traffickers that was driven not only by a surge in demand, but also by the closure of previously accessible migration channels; the EU relations with European Neighbourhood states and – in the case of Turkey – accession candidates that used their position as transit countries of refugee flows to bargain for concessions in return for preventing departures or accepting returns. I will also not discuss the role that third countries ought to play in a burden-sharing scheme for refugee relocation within a union of states (Gerver 2013). While these features need to be considered when explaining and evaluating comprehensively the EU failure in the refugee crisis, I do not think that any of them diminishes the moral duties and the institutional capacities of the EU and its member states to cooperate

in a burden-sharing scheme whose goal is to provide effective protection to as many refugees as possible.

2. States' legitimacy and duties towards refugees

Political theorists generally agree that the citizens whose states provide them with security, liberty and a decent level of social welfare have moral duties towards those more unfortunate people who enjoy none of these benefits and are forced to leave their country in order to seek protection from persecution, violence and threats to their basic human needs. It seems natural to think about these moral duties as humanitarian ones that are similar to our duties to assist and rescue strangers in distress. Such duties fall upon anyone who encounters a stranger whose life is in jeopardy and they are limited in terms of costs and time. We are not obliged to help if this comes at a risk to our own lives and we are not obliged to permanently support strangers whom we have rescued, let alone to invite them to share our homes. Proponents of a humanitarian argument for refugee admission believe that states will be readier to accept the corresponding duties if these are limited both by the strength of needs and the costs of assistance (Gibney 2004: 229-261). However, the analogy with rescuing strangers does not work for refugees who need permanent resettlement and integration in another country.

A humanitarian view contrasts with a normative perspective that regards asylum as a human right. In this latter perspective, a capacity of and commitment to protection of fundamental human rights is a basic condition for the legitimacy of states. States are a potential source of violation of these rights, but state power is also needed in order to protect individuals against such violation. The crucial move in establishing a duty of states to admit refugees is to regard

state legitimacy as not entirely a domestic matter that depends on the protection of fundamental rights of citizens and residents in the state territory, but also as a matter of mutual recognition between states as members in good standing of an international system whose basic norms combine sovereignty rights of states with individual human rights. In this system, each state is primarily responsible for protecting human rights within its own jurisdiction, but if some states fail to do so, then all other states acquire a collective responsibility to restore the damaged protection of human rights that is the main source of their own legitimacy (Carens 2013: 196, Owen 2016). The norm of state sovereignty constrains their duties or rights to intervene in other human rights-violating states, but this constraint does not apply to refugees who are outside their state of nationality or to internally displaced persons in failed states.

This view supports a wider conception of refugees than that of the 1951 Geneva Refugee Convention. A refugee is not only a “person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” (Art. 1). Under a broader definition a refugee is more generally “someone who requires the substitute protection of a new state because their fundamental human rights cannot or will not be protected by the state of membership or usual residence” (Gibney 2015: 452-3).¹

¹ See Shacknove (1985), Carens (2013: 199-203) and Miller (2016: 83) for similarly broad definitions.

States have a first-order duty not to create refugees. If they do not meet this duty because they engage themselves in persecution, because they fail to protect their populations from violence, famines and natural disasters, or because they lack the capacity to do so, then other states acquire a second-order responsibility to admit those as refugees who cannot be protected through external intervention or assistance (Miller 2016: 83). As Owen (2016: 275) suggests, admitting refugees is thus not only a humanitarian duty but a 'legitimacy repair mechanism' in the international state system. In international law nationality functions as a mechanism assigning primary responsibility for individuals to particular states. If this mechanism fails to protect, then other states become in principle responsible for providing substitute protection and membership '*in loco civitatis*' (ibid., see also Price 2009).

As this general responsibility is shared by all states, it seems natural to assume that states should also share the burdens of refugee protection and integration. International law fails, however, to specify any duty of assistance to states faced with large refugee inflows. Only two specific obligations of states in their relations to refugees have become enshrined in international law: *non-refoulement* towards territories where refugees' lives or freedom would be threatened, which is considered a customary duty of international law binding all states, and admission of asylum seekers to determine their refugee status, which is a duty of states adhering to the Refugee Convention.

These core principles of refugee law identify a primary responsibility of states where asylum seekers turn up at the border or on whose shores their boats land not to send them back into danger (*non-refoulement*) and to examine and determine their refugee status. Proximity seems

a morally arbitrary criterion for distributing these responsibilities between states. But, as Carens and Miller explain, when confronted with an asylum claim, states become indeed responsible because refugees have made themselves vulnerable to their decisions, so that what the state decides will inevitably determine their future fate (Carens 2013: 206-7, Miller 2016: 84).²

The big lacuna in current refugee law concerns what happens next. State responsibility cannot be reduced to non-deportation and adjudication; it extends to effective protection and eventually integration of those who cannot return. Putting the burdens of refugee integration on so-called 'frontline states' in the vicinity of refugee generating regimes and crises is not merely unfair towards the former but also means that the numbers of those who are provided with protection will be limited by the resources of these states.

It is easier to agree that current international norms generate an unjust distribution of refugees than to specify what a just distribution would look like. Should it aim primarily for justice among states or for justice towards refugees? The most frequently cited criterion for a just distribution between states is their relative capacity for refugee integration measured in terms of wealth and size. Each state ought to admit refugees in proportion to some indicator combining GDP and population numbers (Thielemann, Williams, and Boswell 2010; Carens 2013: 214-15; Gibney 2015: 457).

² As helpfully pointed out by a reviewer, refugees are also potentially vulnerable to decisions of faraway states that may or may not resettle them. However, in this case the responsibility of states for the future of a particular refugee is still shared among a large number of potential addressees of their claims. By contrast, receiving an asylum claim establishes a special responsibility of a particular state.

Yet particular states can also have special responsibilities for refugees because of their involvement in the refugee generating situation, e.g. if they supported a repressive regime or a warring party in an armed conflict (Souter 2014, Miller 2016: 90) or because they accept a kin state responsibility for a persecuted diaspora, as Germany did for ethnic German expellees from Eastern Europe after World War II. In contrast to the ‘positional’ special duties of proximate states that receive disproportionate numbers of refugees, such reparative and identity-based special responsibilities do not diminish the shares that states have to contribute to a global refugee protection scheme. While the former have strong redistributive claims towards other states, the latter have to contribute their fair shares to global refugee protection on top of their special responsibilities to particular refugees.³

Even a distribution that combines special and general duties of states in this way will, however, fail to approximate the goal of justice towards refugees. The reason is that refugees are not a global public bad similar to carbon emissions the costs for which have to be shared fairly between states in relation to their capacities and involvement. They are human agents with particular ties, needs and plans and these point them often towards particular destinations. Gibney argues along these lines that what is owed to refugees *qua* refugees is a place where they are “likely to flourish” (Gibney 2015: 459) and “can rebuild a meaningful social world” (ibid.: 460). This entails, at a minimum, that states who admit refugees must also admit their

³ As pointed out by a reviewer, states that have been involved in generating a refugee crisis can also deliver their reparative duties by supporting resettlement in neighbouring states if this is better in terms of refugee integration or return options.

family members. But it could also mean that a just distribution of refugees needs to take into account in which countries they are likely to be successful in rebuilding their lives because their skills will be valued and their ways of life will be respected. These will often be countries that have former colonial ties and shared languages with the refugees' countries of origin and where larger numbers of immigrants or refugees from the same origin have already settled before (ibid.: 459). Refugees' preferences in this regard do not constitute a right to choose a specific destination, but they are still morally relevant. When relocating refugees with a view towards their permanent settlement, preferences for certain destinations will often be based on special ties that are not easily measured and the exercise of choice itself can enhance the refugees' commitment to integrate.

If these criteria determine the distribution of refugees, the outcome will be much less arbitrary than allocating full responsibility for integration to the first safe state that asylum seekers can reach, but it will still be unfair towards states that do not admit any because refugees do not have any special ties to them.

These considerations have two implications for a just distribution between states. First, they rule out several other criteria for determining capacity-based fair shares between states that have been occasionally considered in the literature. Second, they suggest that the optimal distribution will equalize the contributions of states to global refugee protection rather than the numbers of resettled refugees in relation to state capacities.

Apart from wealth and population size, territory (as measured by population density) is a third possible criterion for a fair distribution among states. Yet contemporary refugees are not

colonial settlers in search for land but people in need for jobs, education, health care and other public services, all of which can generally be provided more efficiently in more urbanized and densely populated societies.

A fourth capacity-related criterion is a country's immigration history and policy. Prior intake of refugees in the preceding period and current numbers of refugees for whom the state has significant public expenditures should obviously be taken into account, as it would naturally be if an allocation formula uses appropriate time intervals. By contrast, it would be wrong to consider a country's past admission of refugees over a longer period as a ground for discounting its current admission duties. The reason is that refugees who no longer receive state support because they have successfully integrated are not a burden. Even more problematic is the idea that accepting refugees "will take spaces away from others whom the state may positively wish to attract" (Miller 2016: 86-6). This empirical claim relies on what we may call the "fallacy of fixed integration capacity". The fallacy lies in assuming an upper threshold for such capacities determined by the overall share of immigrants (including refugees) in the population. It is in fact more plausible to assume that accepting regular immigrants enhances the capacities of states to also integrate refugees instead of reducing it. This is because immigrants tend to create additional jobs and ethnic networks that newcomers can benefit from. They also transform societies more generally by making them culturally more diverse and thus more open to refugees of different origins (Carens 2013: 215).⁴ It is true that

⁴ As helpfully pointed out by a reviewer, this very transformation is often controversial and may be regarded as a burden on societies that want to retain a previous cultural heterogeneity. I am

an anti-immigrant backlash among the native population may indirectly limit the political capacity for refugee admission. Yet this latter phenomenon is generally not empirically correlated to the share of resident immigrants in the population at either local or national level. Hostility towards immigrants among their citizens is a reason why democratic states may fail to meet their moral duties, it is not a reason to think that they do not have such duties in the first place. Finally, scholars analyzing immigration policies comparatively have found positive correlations between the degree of restrictiveness or openness of policies on labour immigration, family reunification and asylum (Schmid and Helbling 2016). In other words, empirically there does not seem to be a general trade-off between admitting economic and family migrants, on the one hand, and refugees, on the other hand.

Miller's assumption of fixed integration capacities leads him to suggest that refugees should be included in an overall immigration quota. Although within such a quota priority ought to be given to refugees over other immigrants, "[a] state that has set an overall immigration target, on grounds that are publicly justified, can also take steps to ensure that the number of refugees it admits does not exceed the target" (Miller 2016: 92). Miller sees a tragic conflict where "there are some refugees for whom no state is willing to take responsibility: each state sincerely and reasonably believes it has done enough, taking into account the cost of accepting

going to argue below that such states can choose to contribute to global refugee protection through monetary transfers rather than refugee admission. This is quite different from arguing that a society's anti-immigration attitudes justify reducing its contribution to global refugee protection.

refugees, to discharge its fair share of the burden” (Miller 2016: 93, see also Miller 2007: 226-7). Yet no solidaristic scheme of sharing a given collective burden can operate on the principle that each participant can determine and limit her contributions unilaterally (Noll 2015). Even if we hypothesize that states voluntarily set the limit at a level that amounts to their fair shares, this level cannot be determined by their overall immigration targets with respect to which, on Miller’s view, states may rightly pursue their national self-interests. If a country keeps its immigration quota close to zero in order to preserve its relative cultural homogeneity, then this policy preference cannot limit its fair contribution to a scheme of burden-sharing in refugee admissions. Whatever criteria we take into account, fair shares must instead be determined in relation to the overall numbers of refugees, on the one hand, and some objective indicators for capacities and special duties of all states involved, on the other hand.

If we could then work out the fair shares of all states in refugee admission and integration based these criteria, these still seem to conflict with the other consideration that refugees need not just secure residence in another state, but opportunities to build new lives. Normative analyses have either given priority to justice among states – often by emphasizing that refugees do not have rights to choose their preferred destination (Ferracioli 2014: 142, Carens 2013: 216) – or they have set up the two considerations as a dilemma (Gibney 2015) so that we seemed to be forced to choose between them.

Yet the two goals of justice towards refugees and towards states are not incompatible with each other. They can be reconciled if they are properly sequenced. The overall goal must be to provide effective protection to the largest number of refugees. In order to approximate it, we

must in a first step determine the special duties of states towards refugees that are vulnerable to these states' decisions. This first goal explains why duties of *non-refoulement* and admission for adjudication of asylum claims fall naturally on states in the proximity of source countries; it also explains why sometimes neighbouring states have to bear the brunt of the burden of hosting refugees who hope to be able to return and want to stay close to their country of origin. And it explains, finally, why countries that have already admitted higher numbers of refugees are often expected to take even more while others keep their borders closed. Such an uneven distribution of refugees may be the best we can hope for if we ask what particular states owe to each refugee individually. It is, however, not the best solution when asking what ought to be done to offer effective protection to as many refugees as possible.

Justice between states becomes relevant as a second goal once we consider it from the perspective of states' general duties towards refugees worldwide. If refugee protection is a legitimacy repair mechanism in the international state system, then all states ought to contribute in proportion to their resources. The apparent conflict between both goals can be avoided if states can meet their global duties by either admitting refugees or transferring resources to those states that face stronger burdens because of their geographic proximity or because they are better suited for long-term integration. If states have some choice between contributing through admitting refugees or subsidizing refugee admission elsewhere and if the price for buying out of admissions is set at the right level, then many states will rationally choose to offer more slots to refugees rather than pay into the system, for example if they have demographic and labour market needs for immigration that turn refugees in the long run from a burden into an asset (Noll 2003: 237). Refugees, on the other hand, will be rationally

motivated to settle in a country that has chosen to accept them for such reasons rather than in states that would prefer to pay to keep them out.

What I have tried so far is to work out principles for a distribution of refugees under the assumption that states are generally committed to justice for refugees. Any theory of justice for refugees falls necessarily within the domain of what John Rawls has identified as non-ideal theory. In a just world, there would be no refugees, since all states would refrain from persecution and would have sufficient resources and be committed to protecting the fundamental human rights of their inhabitants. Within non-ideal theory, we need to distinguish different levels of idealization. The argument until now has aimed at the highest possible level. I have disagreed with authors who claim that ideally all states ought to agree on admitting shares of the global refugee population that are proportional to their wealth and size, because this principle fails to recognize special responsibilities of states for particular refugees and special links of refugees to particular states. I have then restated the general principle as one of proportional contribution of each state to the global protection of those refugees for whom states do not carry a particular responsibility. If some states choose to contribute by transferring resources that will enable other states to integrate more refugees and to integrate them better than they could have been under a principle of proportional distribution of refugees, then the former system does better in achieving justice for refugees than the latter.

We now need to climb down the ladder of idealization in order to approximate better real world conditions for refugee protection. The first assumption we need to introduce is that is even states that are ready to comply and cooperate in a global system of refugee protection

will be detracted from the goal of justice for refugees by self-interest and prejudice. For this reason, such a system requires common global standards in the determination of refugee status and a global authority that works out an initial determination of refugee quota per country (with the special responsibility modifications discussed above) and that regulates and monitors financial transfers between states. A serious objection to quota trading is that the criteria used by states to select refugees may be discriminatory so that certain refugees have a much lower chance to be accepted in their preferred destination on grounds of their religion, skin colour or sexual orientation. In a collaborative scheme, such negative selection would also produce a stigmatizing effect by marking some groups as particularly unwanted, which would impact on their chance to find adequate protection anywhere. In principle, it should be possible to avoid such effects in a well-designed scheme that imposes non-discrimination constraints on states' preferences. Secondly, the use of transfer payments to states hosting refugees would have to be monitored to make sure that the money is actually used for refugee integration instead of keeping them forever in refugee camps or even deporting them secretly (Gerver 2013).

A number of authors have proposed and discussed various refugee quota trading schemes that aim at optimizing refugee protection among states that are willing to subscribe to this goal while curbing perverse incentives for abuse (Schuck 1997; Hathaway and Neve 1997; Betts 2003; Thielemann 2003). The very idea of trading refugee quota has been criticized by others as a "commodification" of refugees (Anker, Fitzpatrick, and Shacknove 1998; Sandel 2012: 63-64).⁵ Yet this does not seem an appropriate description for making states pay if they are less willing

⁵ See the discussion in Miller (2016: 88-9).

than others to host refugees and rewarding those that are willing to take more. Mollie Gerver objects to the trading of refugee quota on a different ground. For her, it is immoral to reward states for doing what they are anyhow required to do (Gerver 2013: 72-73). This critique is question-begging since it assumes what needs to be argued for: that states' refugee admission duties cannot be substituted by financial contributions that will improve overall protection. Proposals for quota trading schemes have also been criticized for potentially undermining states' adherence to duties of *non-refoulement* and refugee admission under the Refugee Convention (Smith 2004). It is important to remember, however, that burden-sharing schemes are justifiable only as corrective mechanisms; they address the initially unfair distribution of refugee integration burdens resulting from the implementation of present international legal norms without replacing the primary state duties enshrined in these norms. *Non-refoulement* and asylum determination duties are not weakened by relocating refugees for permanent settlement after their legal status has been determined.

The schemes for trading refugee quota initially proposed by Schuck, Hathaway and Neve suffer, however, from one major flaw: they ignore refugees' preferences for certain destinations that are, as I have argued above, morally relevant in order to meet Gibney's goal of doing justice to refugees *qua* refugees instead of regarding them merely as a burden that ought to be distributed fairly among states. Economists have proposed a scheme that complements tradeable admission quotas with a scheme for matching preferences of refugees for certain destinations and preferences of states for certain refugees. As long as discriminatory state preferences can be ruled out, such a scheme could be the best practical way how to

approximate the twin goals of justice for refugees and justice between states (Fernández-Huertas Moraga and Rapoport 2014).

In order to say something that is relevant for refugee protection in the real world, we still need to climb down one more rung on the ladder of idealization. If responsibility for refugee protection could be shared globally it would be spread out widely and thinly among those states that do not themselves generate refugees with only insignificant burdens to each. Many of these states are, however, unwilling to cooperate in a global refugee protection scheme. Some states do not see any benefit in such a scheme if they believe they can seal off their borders against spontaneous inflows. “Treating refugees justly serves relatively few state interests” (Carens 2013: 221). Others perceive refugee protection more optimistically as a global public good, but this conjures up a collective action dilemma since all states have incentives to freeride on the contributions of others (Noll 2003, Thielemann 2003, Gerver 2013). Various ways of mitigating this dilemma have been proposed, such as conceiving of refugee protection as a ‘joint-production model’ in which states benefit in proportion to their contribution (Betts 2003) or as an iterated game in which states develop rational long-term interests in cooperation. But it remains plainly true that in the current international state system, a scheme for fair contributions of states to international refugee protection could only work among a union of states with voluntary membership⁶ and sufficient integration to ensure compliance. I will discuss below whether these conditions hold in the European Union. Before

⁶ As acknowledged by Schuck (1997).

doing so, we need to consider what moral duties states have under conditions of widespread non-compliance.

Under such conditions, a principle that every state needs to contribute a globally fair share only if there are credible assurances that all other states will do so likewise is unworkable. A theory that makes refugee protection conditional upon strongly idealized conditions of compliance, fails in its core task to specify duties in the context of actual refugee emergencies in the real world. Instead, individual states must have third-order duties (in addition to their first-order duty to protect human rights in their own jurisdiction and their second-order duties to take in a globally fair share of refugees) to step in for others who fail to do their bit. Owen concludes that in a world in which rogue states, burdened regimes and selfish states are present, those states that adhere to the norms of refugee protection have to take in more than they would be obliged to if all states fully complied with their second-order duties (Owen 2016: 286).

Does this view entail that the legitimacy of every state depends on its readiness to act alone in admitting refugees even if all other states turn them away? The notion that *our* state cannot be obliged to take in all the refugees of the world is a well-known rhetorical trope employed by politicians everywhere when arguing for restrictions. It can be easily debunked by pointing out that such a duty cannot arise if a sufficient number of states comply with much lighter duties of burden-sharing amongst themselves. Those governments that rhetorically preempt the non-compliance of other states are usually the very same that oppose international efforts of cooperation. The extreme scenario where only one single refugee admitting country carries alone the global burden is anyhow ruled out by a state legitimacy account. Since state

legitimacy is generated through mutual recognition, in order to apply the third-order duty of stepping in where other states fail to comply there must be at least a *group* of states that mutually acknowledge that they share the responsibility that other states have shunned. In other words, Miller's tragic conflict where no state can be held responsible for admitting additional refugees can arise only in a situation where this group is too small and the numbers of refugees too large in relation to their capacities. In such a scenario, the international legitimacy of states grounded in mutual recognition paired with respect for human rights would already have been seriously impaired by both the refugee generating states and all the other states that fail to comply with their refugee protection duties. Refugee protection would remain a humanitarian duty of individual states but could no longer be regarded as a human right backed by international law.

This is the conclusion to draw for international duties to admit refugees. Each state has obligations of *non-refoulement* and admission for the purpose of determining refugee status towards those who seek asylum in its territory and a duty to cooperate in a redistribution of resources and refugees across states, with fair shares being determined by resource-based capacities, on the one hand, and particular responsibilities and links between individual refugees and states, on the other hand. In the absence of global enforcement mechanisms, each state also has a duty to contribute to building the largest feasible 'coalition of the willing' by strengthening the mandate of international organisations, such as the UNHCR, and by committing to contribute its fair share of resources and refugee intake within such a coalition in pursuit of the goal to maximize the number of global refugees whose human rights are effectively protected.

As Zofia Stemplowska has argued, the moral duty to 'take up the slack' if others fail to do their fair share can be legitimately enforced if the beneficiaries are in dire need and assistance can be provided at reasonable cost (Stemplowska 2016). In the international state system there is, however, an enforcement dilemma: Any attempt to set up enforcement mechanisms will deter states from joining a coalition of the willing that is ready to step in where other states shirk their duties to contribute to global refugee protection.

(Miller 2013: 206-27)

3. Does European integration facilitate or prevent burden-sharing?

By contrast, in the EU context refugee protection becomes a collective action problem for a predefined set of member states. This should facilitate a just solution that aligns with shared interests. However, since the collective action problem is of a prisoners' dilemma type, game theory predicts a suboptimal outcome for all players if they do not succeed in coordinating their actions (Noll 2003).

One might expect that European integration and the commitments that member states have made towards each other should provide a nearly ideal context for resolving the problem of burden-sharing in refugee protection. States that are ready to comply with their duties do not have to look around who else might be ready to do so. First, they are already part of a permanent coalition whose members have subscribed to a principle of sincere cooperation with regard to the tasks spelled out in the Treaty on European Union (TEU Art. 4.3) and a principle of solidarity and fair sharing of responsibilities, including its financial implications, between the member states in matters of border checks, migration and asylum (TFEU Art. 80). Already the

1999 Tampere Council conclusions invoked solidarity in building a Common European Asylum System.⁷ Council Directive 2001/55/EC (Temporary Protection Directive) committed member states to a collective response in case of considerable flows of asylum seekers. Second, they participate jointly and equally in supranational executive, legislative and judicial institutions endowed with significant power, which greatly facilitates the task of coordinating efforts to build a fair scheme of burden-sharing. Third, they are geographic neighbours in a regional union that includes multiple alternative destinations for refugees from the same origin travelling on the same routes so that it seems natural to regard the EU as being jointly responsible for refugees in its vicinity instead of assigning this task to individual states of first EU entry. Fourth, one of the more advanced areas of cooperation in the EU is with regard to external border control of the Schengen area, where there is an EU wide system of data exchange (the Schengen Information System) and an EU agency (FRONTEX) charged not only with coordination tasks but also operational ones, including rescue at sea and return of irregular migrants. Asylum seekers who turn up at the external borders make themselves therefore not merely vulnerable to decisions by the state of arrival, but also by the EU at large and all its member states. It seems therefore obvious that these states share a duty of cooperation with regard to refugee admission.

Why has it then been so difficult to translate this duty into institutional rules? There are at least three reasons. The first is that the member states agreed already in the 1990s on a principle of assigning responsibility for asylum determination to the EU state of first entry without adding

⁷ Tampere European Council 15-16 October 1999. Presidency conclusions

to it the necessary complement of a burden-sharing mechanism. Once it had been entrenched in EU law through the Dublin Convention and now the Dublin III Regulation, the Dublin principles were difficult to modify because of the vested interests of a majority of states whom they relieved from the burden of admitting asylum seekers who had already passed through another member state. Dublin has been challenged by decisions of the European Court of Human Rights that found conditions for hosting asylum seekers and processing their applications in some member states below European human rights standards and prohibited forced returns to Greece or Italy.⁸ Yet such judicial constraints did not challenge the basic logic of the system. Instead they added blame to the burdens of frontline states by requiring that they invest more resources into their asylum systems so that they comply with European standards, no matter how many refugees these countries have to deal with. The indirect redistribution of asylum seekers to other states who could not be returned to the EU state of first entry did therefore not establish an alternative burden-sharing mechanism designed to relieve the latter.

The second reason is the lack of shared norms with regard to asylum procedures and the recognition of refugees (Noll 2015). In spite of three relevant directives,⁹ asylum seekers face very unequal opportunities in terms of reception, public assistance, and the probability of

⁸ M.S.S. v. BELGIUM AND GREECE (Application no. 30696/09), judgment of 11 January 2011; TARAKHEL v. SWITZERLAND (Application no. 29217/12), judgment of 4 November 2014.

⁹ Qualifications Directive 2011/95/EU; Asylum Procedures Directive 2013/32/EU; Reception Conditions Directive 2013/33/EU.

gaining protection status. Even for Syrians, who in 2015 had an average recognition rate as refugees of 95% in the EU, this rate dropped to 50% in Estonia and 43% in Slovakia (European Stability Initiative 2015). Hungary's overall rate of recognition of Convention refugees fell from merely 5% in 2014 to 0.1% in 2015 (Eurostat 2016).¹⁰ Unequal standards are problematic not merely because they provide incentives for asylum seekers to choose a destination country because of its high recognition rates rather than its capacity to integrate them well, but also because they undermine solidaristic relocation schemes. A country with restrictive standards will not be ready to accept transfers of refugees from a more generous one if it would have rejected these had they claimed asylum in its territory.

The third reason is the Schengen principle of open internal borders. States of first entry at the external Schengen border lacked both capacities and incentives to fully implement the Dublin Regulation and were thus interested in letting asylum seekers move onwards towards other destinations. Non-EU states on these routes, such as Macedonia and Serbia, did not block these movements knowing that they would be only states of transit. And the main EU destination states of Sweden, Germany and Austria do not have any external Schengen borders where they could have controlled inflows. This combination of open internal borders with external borders that states lacked incentives to control produced the massive migration of refugees via the Balkan route to their desired destinations in summer 2015. It was in this context that German chancellor Merkel decided in August 2015 to unilaterally suspend the implementation of the

¹⁰ Eurostat press release 20 April 2016, at

<http://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/>

Dublin Regulation. This step was partly an acknowledgement of the practical impossibility of returning many thousands of asylum seekers to their first country of entry. It was also a recognition of an outpouring of spontaneous assistance for refugees in civil society dubbed as “Willkommenskultur” (culture of welcome). Finally, one may guess that the German chancellor also acted in order to set an example and put pressure on the other EU member states to agree to a more ambitious relocation plan, which was duly adopted by the EU Council in September. In this plan the member states committed to relocate 160,000 persons from countries of first entry to other member states over the course of two years.

The plan has not worked out. In its progress report of November 2016, the Commission reported a total number of 6,925 persons relocated since October 2015 (5,376 from Greece and 1,549 from Italy), far short of the planned 6,000 relocations per month (European Commission 2016). Instead of committing to burden-sharing through relocation, the transit and destination states on the refugee routes started to control and physically close internal Schengen borders by establishing checkpoints and building border fences. Controls at these previously open borders have had significant side-effects for EU citizens who commute across them on a daily basis. And the crisis became an institutional one when the decision to top up the relocation numbers from 40,000 to 160,000 was adopted in the European Council in September 2015 by qualified majority against the votes of the Visegrad group of states (Czech Republic, Hungary, Romania and Slovakia) whose governments subsequently announced that they did not intend to comply. In October 2016, the Hungarian government even held a referendum (that failed because of low turnout) asking voters to reject the EU plan for relocation. What saved the EU from complete failure and full-blown institutional crisis was the so-called EU-Turkey Statement

of 18 March 2016 that led to a substantial reduction of new arrivals from that country. Given the increasing strains in EU-Turkey relations due to the authoritarian turn of the Ankara government, the future prospects of this agreement are rather uncertain.

What lessons can be drawn from the failure of the EU to realize its institutional potential for an effective burden-sharing scheme in refugee admission? First, and most importantly, such a scheme cannot get off the ground as long as the states involved maintain the rule that first countries of entry carry full responsibility for admitting asylum seekers, processing their applications, deporting the rejected ones and hosting permanently those who gain a protected status. In the European Union the common control of external borders and open internal ones imply that asylum seekers do not only enter Greece or Italy but also EU territory. There are thus two layers of national and supranational responsibility as soon as an asylum seeker steps ashore or crosses an external land border. The Dublin principle of assigning responsibility exclusively to the first safe EU country should not only have been temporarily suspended but renegotiated and replaced with a multilayered functional division of responsibilities.

Second, as explained in section 2 above, the sharing of norms is an indispensable pre-condition for cooperative games of burden-sharing (Noll 2003). There are no good reasons why people escaping from the same context of origin have different opportunities of receiving recognition and protection in different states. In an international context, it will remain a sovereign prerogative of states to interpret and apply the norms of international refugee law. In the EU context, however, member states have already agreed to norm sharing through a set of EU directives but remain locked into negative competition between alternative destinations, which

creates an incentive for each state to tighten its own admission standards in order to divert asylum seekers to states with less restrictive ones. This reason for uniformity with regard to the award of legal status need not apply in the same way to standards for integration regarding accommodation, training and social assistance for asylum seekers, since these depend more strongly on state capacities and comparable social provisions for local populations. In such respects, baseline standards, such as a limits on the time for which asylum seekers can be excluded from access to employment rather than uniformity are called for.

Third, the principles for a relocation scheme need to be fundamentally rethought. The one currently pursued by the EU relies on a “mandatory distribution key using objective and quantifiable criteria (40% of the size of the population, 40% of the GDP, 10% of the average number of past asylum applications, 10% of the unemployment rate)” and prospects of recognition (nationalities with an EU average recognition rate of 75% or more) (European Commission 2015). Such a scheme is unworkable for relocations on a grand scale if it is insensitive to the particular links between refugees and destination states discussed in section 2.

I have endorsed there relocation schemes that aim to match preferences of refugees and states. The general arguments for such a scheme become stronger in the EU context. First, relocating refugees to countries where they are unwilling to go and that are unwilling to have them comes at very high political cost in terms of democratic support in the host country. In the EU, such a scheme is additionally bound to undermine general support for EU integration since governments that are forced to comply can divert blame by fueling resentment against the EU

institutions. Second, such a relocation scheme is likely to be ineffective in a European context where refugees, once they have gained protection status, can relocate themselves through secondary migration to a preferred destination.

Should a solidaristic relocation scheme also take into account the preferences of host states? It would be self-defeating to let countries that are part of a European scheme simply opt out and impose thereby additional burdens on the other states. Yet governments and citizens of some countries may strongly prefer to contribute financially rather than through accepting relocated refugees. As long as such countries accept their duties to keep borders open for asylum seekers – who can be subsequently be relocated within the scheme – and to admit permanent refugees with particular ties, they should be allowed to trade off their admission duties against financial support for other countries that are willing to host refugees. The price they pay per refugee whom they do not want to admit should not be fixed, but ought to reflect the cost their exclusionary preference imposes on the other states (Rapoport and Fernández-Huertas Moraga 2014). By contrast, the EU's current location scheme foresees a payment of EUR 6,000.- from the EU budget to destination states per refugee relocated from Greece and Italy.

5. Conclusions

This paper has endorsed David Owen's view that refugee protection is not merely a humanitarian duty but a 'legitimacy repair mechanism' in international relations. I have interpreted this view as entailing a second-order duty of states to cooperate with other states in such a way that a maximum number of refugees can receive effective protection. I have tried to resolve an apparent conflict between justice for refugees and justice in burden-sharing

between states by arguing that an unequal distribution of refugees across states participating in a burden-sharing scheme is justified insofar as it enhances the capacity of the scheme to meet the goal of effective protection for the largest number of refugees. This can be achieved if states that end up with relatively smaller shares contribute to refugee integration in other states in proportion to the costs that the lower intakes in the former generates for the latter.

In the international arena burden-sharing requires a coalition of the willing that is unlikely to come about because of the incentives for states to freeride on others' contributions to global refugee protection. The EU as a regional union of states with relatively powerful institutions of supranational government is in a nearly optimal position to establish an effective regime of burden-sharing involving all its member states. Yet when put to the test in summer 2015, the EU failed. The states of first entry and final destination had to carry hugely disproportionate and uncompensated burdens. This is partly due to the incomplete prior harmonization of norms regarding reception and determination of asylum status across member states. Even more important is the clash between the Dublin Regulation's assignment of responsibility to the EU state of first entry and open borders in the Schengen area. The result has been a perceived breakdown of public order through uncontrolled movements of refugees towards their preferred destination and widespread defection of member states from the agreed refugee relocation scheme as well as from the Schengen principles.

When exposed to the external shock of the 2015 surge in refugee numbers, the latent contradictions between incompletely Europeanized asylum standards, the Dublin principles and open internal Schengen borders have become manifest. The impact of the refugee crisis on

trust in European institutions and their capacity to ensure member state compliance is potentially devastating. Yet the strongest costs are born by the refugees themselves and they can be measured in the numbers of recorded deaths and missing migrants on the route to Europe.¹¹

¹¹ IOM reported 5,083 deaths in the Mediterranean Sea in 2016, up from 3,777 in 2015 and 3,279 in 2014 (IOM 2017). The relatively stable numbers in 2014 and 2015 in spite of the dramatic increase of arrivals in Europe in 2015, and the stark rise of recorded deaths in 2016 seem to be mainly due to the effective closure of the less dangerous route via Greek islands and the Balkans and the resurgence of much more risky crossings from Libya to Italy in 2016.

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